June 11, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am a rising third-year law student at the City University of New York (CUNY) School of Law, and I am writing to apply for the clerkship opening in your chambers for August 2024. Having grown up in a low-income immigrant neighborhood, I understand the value of community and public service. Enclosed with my application is evidence of my commitment to public service throughout my career. Working in Maryland this summer, I realized that a federal clerkship in the Mid-Atlantic would be an excellent and fulfilling way to continue my career in public service.

In law school, I have focused my energy on gaining as much experience in courtrooms as I can. My judicial internships at the Second Circuit U.S. Court of Appeals and the New York State Supreme Court have exposed me to a law clerk's work. As a judicial intern, I have been responsible for digesting case facts, researching novel areas of the law, and writing concise and precise memos for judges. This experience has helped me to analyze issues from multiple perspectives, allowing me to approach cases objectively and effectively. I also now understand the need to balance meeting deadlines while maintaining clarity, concision, and accuracy. This summer, I plan to continue improving these legal research and writing skills as a Summer Associate at a Baltimore civil rights law firm.

Please find my resume, writing sample, and transcripts enclosed. My letters of recommendation will be sent separately from my recommenders. They are:

Shirley Lung
Professor of Law
Lung@law.cuny.edu
718-340-4322

Jason Parkin
Co-Director, Economic Justice Project & Professor of Law
Jason.parkin@law.cuny.edu
718-340-4621

Merrick T. Rossein
Professor of Law
Rossein@law.cuny.edu
718-340-4316

Deborah Zalesne
Professor of Law
Zalesne@law.cuny.edu
646-637-3708

Thank you for your consideration, and I hope to have the opportunity to interview with you.

Respectfully,
Jason J. Zheng

JASON J. ZHENG (He/Him)

265 Cherry Street, Apt. 2H, New York, NY 10002 | (917) 900-2365 | Jason.Zheng@live.law.cuny.edu

EDUCATION

CITY UNIVERSITY OF NEW YORK SCHOOL OF LAW
J.D. Candidate, May 2024; GPA: 3.8; Pipeline to Justice Alumni; Trial Practice Student: see videos.
Leadership Activities: Vice President, Asian Pacific American Law Student Association; Senior Staff Editor, Law Review; Vice President, American Constitution Society; Teaching Assistant for Professor Deborah Zalesne's 1L Contracts Class.

JOHN JAY COLLEGE OF CRIMINAL JUSTICE (City University of New York)
B.S. Criminal Justice, December 2018; Minor in Theater Arts.

EXPERIENCE

CREATING LAW ENFORCEMENT ACCOUNTABILITY & RESPONSIBILITY (CLEAR) CLINIC, CUNY SCHOOL OF LAW, Long Island City, NY, Fall 2023
Prospective Student Attorney: Provide pro bono legal representation in support of partner communities and movements. Represent and advise clients concerning government policies and practices related to national security, counterterrorism, and Chinese espionage.

BROWN, GOLDSTEIN & LEVY, Baltimore, MD, Summer 2023
Summer Associate: Assist in cases on behalf of exonerees in state and federal wrongful conviction proceedings, including researching and drafting petitions for compensation and written discovery requests. Support ongoing litigation in federal civil rights matters, including employment, immigration, fair housing, trans, and disability rights.

JUDGE MYRNA PÉREZ, U.S. COURT OF APPEALS, SECOND CIRCUIT, New York, NY, Spring 2023
Judicial Extern: Reviewed immigration removal proceeding petitions and wrote bench memos analyzing whether to grant, deny, or move petitions to the regular argument calendar. Researched relevant case law, statutes, and the appropriate standard of review. Reviewed new Second Circuit opinions and wrote bench memos on whether Judge should call for *en banc* review. Proofread, blue booked, and cited checked opinions and summary orders. Observed oral arguments and participated in post-argument roundtable chamber conferences.

MANHATTAN DISTRICT ATTORNEY'S OFFICE, RACKETS BUREAU, New York, NY, Fall 2022
Legal Intern: Assisted with investigations on white-collar matters involving wage theft, financial and tax fraud schemes, and illicit money movements, including cryptocurrency money laundering and wire fraud. Researched and wrote memos analyzing the legality and admissibility of evidence and statements. Observed criminal court proceedings and conferences. Cabined and reviewed discovery materials. Ensured that exculpatory and impeachable evidence was given to defense counsel consistent with statutory and Constitutional requirements. Helped prepare for *Mapp*, *Huntley*, and *Dunaway* hearings.

JUSTICE PINEDA-KIRWAN, NEW YORK STATE SUPREME COURT, Mineola, NY, Summer 2022
Judicial Intern: Worked on property and employment cases. Digested case files, researched relevant law, and wrote bench memos analyzing whether to grant or deny a motion. Worked on summary judgment, motion to dismiss, and order to show cause motions. Observed preliminary, compliance, certification, settlement, and motion conferences. Observed bench trials.

JING FONG RESTAURANT, New York, NY, 2017 – 2020
Manager: Managed over 100 employees. Developed and executed strategic plans to increase profit margins.

TWO BRIDGES COMMUNITY COUNCIL, New York, NY, 2014 – Present
Representative & Community Organizer: Represent the Two-Bridges Chinese community. Speak on their behalf about community concerns and needs. Translate vital Section-8 housing information to 70 Chinese tenants. Organize community events such as the Lunar New Year celebrations, Hurricane Sandy food and shelter relief, and summer night youth basketball tournaments. Facilitated food pantry for the community during the Covid-19 pandemic.

PERSONAL

Proficient Cantonese speaker; Chinese lion dancer; weightlifter; history buff.

Law Student Copy Academic Record

Name: Jason Zheng
Student ID: 16074881

Birthdate: 06/10
Student Address: 265 Cherry Street Apt 2H
New York, NY 10002-7933
Print Date: 06/06/2023

Other Institutions Attended:

Academic Program History

Program: Law
06/09/2021: Active in Program
06/09/2021: Law JD Major

---------- **Beginning of Law Record** ----------

2021 Fall Term

Course	Description	Earn	Grd
LAW 701	Contract Law Market Economy I	3.00	CR
Contact Hours:	3.00		
LAW 705	Legal Research	2.00	CR
Contact Hours:	2.00		
Course Attributes:	ZERO Textbook Cost		
LAW 7004	Lawyering Seminar I	4.00	CR
Contact Hours:	4.00		
LAW 7043	Liberty Equality & Due Process	3.00	CR
Contact Hours:	3.00		
LAW 7131	Crim L-Rsp Inj Condu	3.00	CR
Contact Hours:	3.00		

2022 Spring Term

Course	Description	Earn	Grd
LAW 702	Contracts: LME II	3.00	A-
Contact Hours:	3.00		
LAW 709	Civil Procedure	3.00	A
Contact Hours:	3.00		
LAW 7005	Lawyering Seminar II	4.00	A-
Contact Hours:	4.00		
LAW 7141	Torts-Rsp Inj Conduc	3.00	A
Contact Hours:	3.00		
LAW 7161	Law and Family Relations	2.00	A-
Contact Hours:	2.00		

Academic Standing Effective 06/28/2022: Good Academic Standing

2022 Summer Term

Course	Description	Earn	Grd
LAW 780	Criminal Procedure: Investigat	3.00	A-
Contact Hours:	3.00		

2022 Fall Term

Course	Description	Earn	Grd
LAW 811	Criminal Procedure:Adjudica	3.00	A
Contact Hours:	3.00		
Course Attributes:	Low Textbook Cost		
LAW 7192	Constitutional Structures	3.00	A
Contact Hours:	3.00		
LAW 7251	Public Institutions/Admin Law	3.00	A-
Contact Hours:	3.00		
LAW 7261	Federal Courts	3.00	A-
Contact Hours:	3.00		
LAW 7723	Teaching Assistant	2.00	A
Contact Hours:	3.00		

Academic Standing Effective 01/18/2023: Good Academic Standing

2023 Spring Term

Course	Description	Earn	Grd
LAW 804	Law Review Editing	1.00	CR
Contact Hours:	3.00		
LAW 825	Lawyering Seminar III	4.00	A
Course Topic:	TRIAL PRACTICE		
Contact Hours:	4.00		
LAW 7151	Property: Law & Market Eco III	4.00	A
Contact Hours:	4.00		
LAW 7292	Evidence-L&Pub Int 1	4.00	B+
Contact Hours:	4.00		
LAW 7723	Teaching Assistant	2.00	A
Contact Hours:	3.00		

2023 Fall Term

Course	Description	Earn	Grd
LAW 861	CLEAR Clinic		
Contact Hours:	12.00		
LAW 7726	Topics In Law		
Course Topic:	Approaches to Discrimination		
Contact Hours:	3.00		

End of Law Student Copy Academic Record

June 2, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am pleased to write a letter recommending Jason Zheng for a federal clerkship. Mr. Zheng was a student in my year-long Contracts class his first year and was then my teaching assistant the following year. From our many interactions, I find him to be an a highly motivated student who demonstrates a strong commitment to the public interest.

In Contracts, Mr. Zheng was able to distinguish himself right away. He is a serious student with exceptional legal reasoning and writing skills. He reads cases with attention to detail and uses them effectively to make persuasive legal arguments. These skills earned him close to the top grade in Contracts, a large lecture class. Mr. Zheng is exceptionally smart, passionate about CUNY Law's public service values, and eager to implement them in his work. I would easily rank him as among the top five percent of students I have taught over the past twenty odd years.

Not only is his writing exceptional, but Mr. Zheng was also a frequent class participant in Contracts, consistently elevating the level of class discussions. His diverse experiences before and during law school reflected positively on his ability to analyze fact patterns. He regularly brought to bear in classroom dialogue his perspective as a leader, mentor, and advocate in his Asian immigrant community in New York. From this vantage, he effectively challenged assumptions and provided texture and depth to discussions about the impact of sexism, racism, and other inequalities on bargaining. In discussions with him both in and out of the classroom, he showed an impressive ability to step outside the confines of doctrine to understand how aspects of the law would likely have real effects on the conduct of individuals. He has a depth of interest and understanding that is a strong indicator of real talent for law.

Based on Mr. Zheng's maturity and understanding of the law, as well as the respect he commands from his peers, I sought him out to be a teaching assistant for my Contracts class this past year. In this capacity
he tutored individual students, provided feedback on writing assignments, and conducted review sessions for the entire class. Needless to say, Mr. Zheng's work was exceptional. The students found him approachable and knowledgeable about contract law, and I found his assistance invaluable.

In addition to academics, Mr. Zheng has also been very engaged in the law school community, where he is highly regarded among his peers for his passion, vision, and unique voice, and where I have witnessed his strong leadership skills and deep concern for others.

Overall, I am certain Mr. Zheng will be a dynamic legal scholar and effective advocate. I am confident he will continue to distinguish himself in whatever endeavors he undertakes and I recommend him without hesitation. If you would like additional information, please feel free to call me at 646.637.3708.

Sincerely,

Deborah Zalesne
Professor of Law

Deborah Zalesne - Zalesne@law.cuny.edu - _718_ 340-4328

June 12, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I write to strongly recommend Jason Zheng for a federal clerkship. Mr. Zheng has a strong academic record matched by both work and personal experiences that show a passionate commitment to civil rights litigation across a broad spectrum of areas. He has a compelling sense of personal, community, and professional purpose. Mr. Zheng has strong legal analytical, research, writing, and advocacy skills, as well as a superior ability to work with others. I have no doubt that he will bring intelligence, resourcefulness, and precision to his work as a law clerk.

Mr. Zheng was a student in my Torts class in Spring 2022. The Torts course integrates doctrine and theory with practice skills, and addresses the impact of race, gender, class, and immigration status on limiting the remedies available to someone when they are harmed by state or private behavior. As demonstrated throughout the semester, Mr. Zheng's legal analytical and writing skills are very strong. He tackles difficult legal issues and assignments, and analyzes problems, with clarity, precision, and thoroughness. Mr. Zheng demonstrated an excellent ability to master doctrine, and a fluid ability to use relevant law and facts. He cogently and diligently analyzes facts from many perspectives, and exercises excellent judgment in generating alternative positions. Other students often commented that the hypotheticals that Mr. Zheng posed to clarify doctrine were immensely helpful in their gaining a more nuanced understanding of tort rules.

Beyond strong analytic skills, I was most impressed by Mr. Zheng's constant desire to connect up all of what he was learning in his first-year courses to understand the tools and strategies that a civil rights attorney has at their disposal for representing marginalized communities. Mr. Zheng's questions sought to integrate doctrinal substance with procedural rules, and theory with nuts and bolts practice. I could tell even at that early point of his law school career that he was focused on developing the skills and habits needed by a successful practicing attorney who masters substance, procedure, and practicalities. I also appreciated Mr. Zheng's critical engagement with systemic structures that shape tort law and policies. His comments underlined the need for reform to make these systems, as well as government, more responsive to the needs of marginalized communities.

Mr. Zheng has a passionate commitment to litigation, advocacy, and reform to hold "systems" and government accountable to communities that are exploited, whether by private parties or governmental actors. From our conversations, he speaks powerfully about the importance of constitutionalism. As a child raised by immigrant parents in New York City's Chinatown, he has borne witness to how new immigrants have been impacted by exploitation as well as adverse governmental practices. I have no doubt that Mr. Zheng will become an intelligent and staunch advocate. He has a strong sense of his own path as a lawyer safeguarding civil and human rights.

Mr. Zheng has shown that he can function at a high level in mastering new subject matter, and integrating himself into the professional norms and expectations of diverse legal environments. It is evident from his resume that Mr. Zheng has worked assiduously to hone his legal analytical, research, and writing skills, as well as subject matter exposure, across a wide range of issues. These include national security and counterterrorism, wrongful convictions, immigration removal proceedings, white collar crimes (wage theft, tax fraud, money laundering), and employment law. Further, he has worked in different types of legal environments, including law school clinic, judicial clerkship, small firm practice, and government law office.

I am equally confident that Mr. Zheng will bring a strong sense of professionalism and great respect toward everyone that he will interact with in the legal system. It has been a privilege to work with Mr. Zheng. He is hard-working, refreshingly inquisitive, humble, collaborative, creative, and engaged. He carries a strong sense of fellowship and community in how he implements his work.

I highly recommend Mr. Zheng for a federal clerkship. If you have questions, please do not hesitate to contact me.

Sincerely,

Shirley Lung
Professor of Law
CUNY School of Law

The City University of New York

CUNY SCHOOL OF LAW

Law in the Service of Human Needs

Prof. Merrick Rossein
Professor of Law
Rick.rossein@law.cuny.edu

(718) 340-4316 Tel
(718) 340-4394 Fax

2 Court Square
Long Island City, NY 11101-4356

June 11, 2023

Dear Judge:

I enthusiastically recommend Mr. Jason Zheng for a Clerkship. I am confident that Mr. Zheng will be an excellent Clerk and attorney. His analytic, writing, research, and speaking abilities are excellent.

Mr. Zheng was in my Trial Practice Seminar in the spring 2023 semester. I asked him to serve as a Teaching Assistant (TA) in the spring 2024 semester, a position reserved for the best students. He consistently demonstrated excellent work in the Trial Practice class. He was one of the best among a very strong group of students.

The Trial Practice Seminar involved the students in learning and role playing trial preparation. Each student conducted pretrial depositions, argued a motion *in limine*, practiced direct and cross examination, opening, and closing arguments. He was critiqued by outstanding guest trial lawyers. He participated in a full in-person trial before a mock jury. His trial performance was excellent. The trial, including the pre-trial conference with the Judge where he argued a motion in limine, lasted over five hours. His direct was well developed and performed. His closing argument was powerful, locking eyes with the jurors and speaking directly to them without notes. Each student also produced a number of memoranda of law, a pre-trial memorandum, and a trial notebook. Although the seminar is four credits, the students actually put in more than four credits worth of work. It is a very demanding class. Mr. Zheng was a strong student who was consistently and thoroughly prepared to engage in high-level work.

Mr. Zheng is very bright with a keen intellect. He demonstrates excellent analytical and clinical judgment skills. His writing is clear and concise. His oral skills are excellent. He maintains a calm demeanor while persuasively arguing legal and factual points with strength. He learned well the critical importance of facts in litigation.

He worked very hard preparing all his in-role assignments and performed excellently. He was particularly good at critiquing his colleague's work. His classmates very well respected him. Mr. Zheng is also deeply reflective and insightful about his work and developing lawyering skills. He examined each piece of work after completion to learn from both his strengths and the areas with which he identified as needing more attention. He was also an adept collaborator with his "co-counsel" with whom he worked diligently. He is both a strong learner and teacher.

To place my reference in context, in addition to being on the faculty for over thirty-six years and the former Acting Dean, I continue to practice law and am currently serving as a litigation consultant to the U.S. Department of Justice, Civil Rights Division assisting in a sexual harassment case in Maryland. In 2021 I served the Civil Rights Division as an expert assisting in implementing a consent decree in a sexual harassment case in Florida. I served as the Independent Investigation Counsel for the NYS Assembly Standing Committee on Ethics and Guidance responsible for investigating claims of harassment, discrimination, and/or retaliation against assembly members.

I was a civil rights trial lawyer for many years. I litigated numerous race, sex, age, and disability discrimination cases, including the landmark sexual harassment case of *EEOC v. Sage Realty Corporation,* in which I prevailed for my client after trial. In another case, *Leibovitz v. New York City Transit Authority*, the recently passed U.S. District Court Judge Jack B. Weinstein in the attorneys' fees decision wrote: "Counsel [Rossein] ...is an extraordinarily able attorney specializing in discrimination litigation. *** Counsel was dealing with a difficult area in this field. He showed extraordinary skill [at trial]." *See,* 1999 WL 167688 E.D.N.Y. February 25, 1999.

I was selected and served for three years as the Independent EEO Consultant based on a U.S. District Court decision and remedial order in *U.S. and the Vulcan Society v. the City of New York.* After the court found that the New York City Fire Department's hiring practices discriminated based on race and ordered major reforms, the court mandated that a consultant develop compliance reform.

Mr. Zheng, in addition to being an outstanding student committed to public service law, is also a wonderful person with whom to work. He is an interesting and involved person. He is very inquisitive and is always seeking to learn and become an outstanding social justice lawyer. I am confident that he will do excellent work and promises to be an outstanding Clerk and lawyer. I have no doubt that he will be a valued asset to you. Please let me know if you need additional information.

Sincerely,

Merrick T. Rossein

Merrick T. Rossein
Professor of Law

June 12, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

It is my pleasure to recommend Jason Zheng, a member of the City University of New York School of Law's class of 2024, for a clerkship in your chambers. I am a Professor of Law at CUNY, and I have known Jason since August 2021, when he began as a student in my first-year Lawyering Seminar. Based on his performance in that course, as well as the conversations I have had with him about his goals as a law student and future lawyer, I believe that he is a strong candidate for a clerkship in your chambers.

Jason consistently stood out in my Lawyering Seminar, making insightful and constructive contributions during every class session. The Lawyering Seminar is an intensive, four-credit course that teaches legal reasoning, professional responsibility, legal writing, and other lawyering skills by integrating clinical methodology with substantive, theoretical, and doctrinal material. Over the course of the semester, Jason interviewed his simulated client, drafted and revised legal memos that analyzed the strengths and weaknesses of his client's claims, and counseled his client about the client's options in light of his research and analysis. Jason performed each task very well; he brought a sensitive, client-centered approach to his interactions with his simulated client, and his legal analysis and writing was thorough, well-reasoned, and concise.

As I got to know Jason through his work in class, I became impressed by his dedication to becoming the best lawyer he can be. He routinely stayed after class and came to my office hours looking for ideas and tips for sharpening his analysis and improving his writing. He wanted to chat about the cases we were reading and how they might affect his client's situation. He absorbed all of the feedback I sent his way, skillfully incorporating it into his subsequent work. And through it all, he remained focused on developing his lawyering skills with an eye toward best serving his future clients. I can't think of a better attitude for a student to bring to their first year of law school.

As I got to know Jason over the past two years, I came to appreciate his drive to be an excellent attorney. Prior to law school, he founded and ran an e-commerce business and managed a restaurant in Manhattan. He learned the value of legal expertise and the harms caused by legal systems that can be so dismissive of basic human needs. He has also been a leader in his community, serving as tenant representative, translating vital legal information, and helping to run a food pantry during the pandemic. And since beginning law school, he has sought out opportunities that will give him a strong foundation for a career in litigation. He has been a summer intern in the Manhattan District Attorney's Office and a civil rights law firm; he has interned with federal and state court judges at the trial and appellate levels; he has completed CUNY's rigorous trial practice course; and next fall he will participate in the law school's Creating Law Enforcement Accountability and Responsibility (CLEAR) Clinic. Taken together, these experiences give Jason a broad perspective on litigation and advocacy and an essential set of lawyering skills that will serve him well as a law clerk.

In short, Jason is a smart, hardworking, and focused law student with an impressive drive to become an excellent lawyer. He is a quick learner who is enthusiastic and curious about the law and legal practice. I would be happy to discuss this recommendation further. I can be reached at 212-222-1008 (cell) and jason.parkin@law.cuny.edu.

Sincerely,

Jason Parkin
Professor of Law

JASON J. ZHENG (He/Him)
265 Cherry Street, Apt. 2H, New York, NY 10002 | (917) 900-2365 | Jason.Zheng@live.law.cuny.edu

Writing Sample

This writing sample is a memorandum of law I wrote for my Trial Practice Seminar. It sets forth the points that we, the Defendants, intend to prove in a Title VII retaliation jury trial. This version of the memorandum contains no edits or feedback from anyone.

PRELIMINARY STATEMENT

Plaintiff Diane Leibovitz brought this action claiming retaliation under Title VII of the 1964 Civil Rights Act (as amended, 42 U.S.C.§§ 2000e et seq.) Defendants Monroe Easter, Joseph Hoffman, and the New York Transit Authority ("TA") (hereby "Defendants") submit this pre-trial memorandum of law setting out the points they intend to prove at trial.

Plaintiff's claim of retaliation is meritless. She can neither make out her prima facie burden nor disprove the Defendants' legitimate non-retaliatory reasons. She failed to establish materially adverse action affecting the terms and conditions of her employment. Instead, the TA's actions benefited her. Even if Plaintiff could establish materially adverse action, she cannot prove that there was a causal connection between this action and her protected activity because Defendants took corrective actions to address her shortcomings before her report. Moreover, the Defendants' legitimate reasons were not pretextual because their actions were normal TA practice.

FACTUAL BACKGROUND

The TA's job is to keep the New York City subway system safe for its 2.8 million daily riders. It is an organization that invests in its employees by promoting from within. Mr. Hoffman and Mr. Easter are great examples of TA lifers, both having spent the last 24-plus years as TA employees, holding numerous positions. Mr. Hoffman began working for the TA in 1988 as a Clerk and held positions as an Electrician, Chief Mechanical Officer, and now the Vice President. (Hoffman Dep. 5:1-10, June 16, 2022). Mr. Easter started his career in 1996 (Easter Dep. 13:20-22, June 24, 2022), and today, he is the 240th Street Maintenance Shop ("240 shop") Superintendent. (Easter Dep. 5:18-21, June 24, 2022). In 2021, while in this leadership role, Mr. Easter had three Deputy Superintendents reporting to him: Charles Figliola, Russell Woodley, and Plaintiff Diane Leibovitz. (Easter Dep. 5:7-13, June 24, 2022).

Plaintiff started working for the TA in 2014 as Director of Budget and Administration. (Leibovitz Dep. 15: 6-10, Aug. 15, 2022). Two years later, the TA invested in her and created a unique position for her to shift from administrative work to operations. (Leibovitz Dep. 31:8-16, Aug. 15, 2022). The TA supported Plaintiff's desire to work in an operational role and made her "Deputy Superintendent in Training" of the 240 shop. Id. Eventually, the TA gave Plaintiff the opportunity to work at the Corona Maintenance Shop ("Corona shop") as an official Deputy Superintendent for the car appearance unit. (Leibovitz Dep. 58: 6-13, Aug. 15, 2022). Approximately five months later, she had the opportunity to work in the inspection unit at the Corona shop. (Leibovitz Dep. 63: 17-21, Aug. 15, 2022). A few months later, she was transferred within the Corona shop again and had the opportunity to work in train troubles. (Leibovitz Dep. 76: 22-24, Aug. 15, 2022). Then, sometime in 2019-2020, she was transferred back to the 240 shop and was in charge of the inspection line unit. (Leibovitz Dep. 83: 8-10, Aug. 15, 2022).

In May of 2021, Monroe Easter was transferred to the 240 shop and became Plaintiff's direct supervisor. (Easter Dep. 4:22-24, June 24, 2022). Mr. Easter oversaw the maintenance of car equipment and ensured service to the "1" train. Id. Mr. Easter observed that Plaintiff was deficient in her knowledge of car equipment and did not have the training to succeed in her position, jeopardizing the safety of subway operations. For example, under her management, there were issues with subway brakes, malfunctions with air conditioners, general maintenance issues, and failure to complete repairs. Mr. Easter had several conversations with Plaintiff about remedying these issues and made recommendations based on his experience and expertise. (Easter Dep. 169, July 21, 2022). The problems were ongoing from May-August, and at one point, another TA employee reported that a subway brake was found on the street after it fell off a suspended train track. (Easter Dep. 211-212, July 24, 2022). This brake incident was a serious matter for the

TA because a 50-pound brake falling from the tracks could lead to severe injuries to pedestrians and outstanding liability for the TA. Issues were ongoing, and rather than write up Plaintiff, Mr. Easter transferred her within the 240 shop to the car desk unit, hoping she would succeed and gain additional experience. (Leibovitz Dep. 8, Aug. 15, 2022).

Mr. Easter was required to complete Plaintiff's annual evaluation and her management performance review ("MPR") by September 2021. On September 17, 2022, Mr. Easter submitted Plaintiff's MPR with an overall grade of "marginal," and Plaintiff signed this MPR. Pl. Ex. 3. Mr. Easter gave her a "marginal" because he held her responsible for the problems at the 240 shop. Plaintiff's failure to communicate effectively with her subordinates and her lack of technical skills were also reasons why she received a "marginal." (Easter Dep. 95:1-10, June 24, 2022). In Plaintiff's MPR, Mr. Easter noted that she lacked the technical skills required for her position. Plaintiff also attested to her inability to address specific technical problems. However, a "marginal" grade does not immediately affect one's employment status. Instead, it highlights areas where an individual needs improvement; the TA will then set forth goals and action items for the individual to address these issues. Pl. Ex. 26. The TA's system is created to help employees improve; this is the TA investing in its employees and not a form of punishment. The MPR is valuable because it is used as a measurement to ensure that employees are meeting the standards necessary to keep subways safe and to invest in employees when they lack a particular skill.

On September 23, 2021, Plaintiff heard about an incident where her fellow Deputy Superintendent Russel Woodley, sexually harassed a car cleaner. Plaintiff followed TA policy guidelines and reported these allegations.

On December 3, 2021, Plaintiff learned of her transfer to the Overhaul Shop at 207th Street ("207 shop"). Vice President Hoffman decided to transfer Plaintiff to receive the necessary

technical training so that she could be more successful in positions requiring superior knowledge of subway trains. (Hoffman Dep. 34, June 16, 2022). At the 207 shop, Plaintiff was mentored by Richard Buffington, an experienced technician whose been with the TA since 1977. (Hoffman Dep. 53, June 16, 2022). Additionally, Mr. Hoffman decided to overrule Mr. Easter and changed Plaintiff's overall MPR rating to a "good" and her other two technical skill "marginal" ratings to "good." (Hoffman Dep. 34, June 16, 2022). Despite Plaintiff's lack of technical skills, Mr. Hoffman took these actions based on his understanding of Plaintiff's work and because he wanted to provide her with technical training without hindering her career. (Hoffman Dep. 34, June 16, 2022).

Mr. Easter made no changes to Plaintiff's MPR grade after submitting it on September 17, 2022, and only learned about its change in December 2021. Pl. Ex. 3.

Plaintiff now brings a Title VII retaliation suit against Defendants for giving her a "marginal" MPR grade and for transferring her to the 207 shop. However, the transfer to the 207 shop notably did not decrease Plaintiff's salary. She got a raise, kept the same title, had a team to manage, and received mentorship and technical training.

ARGUMENTS

DEFENDANTS DID NOT RETALIATE AGAINST PLAINTIFF FOR REPORTING A SEXUAL HARASSMENT INCIDENT

Title VII Section 704(a) prohibits employers from retaliating against employees for opposing discriminatory practices. 42 U.S.C.A. §2000e-3(a).

Retaliation claims under Title VII are evaluated under a three-step burden-shifting analysis. First, Plaintiff has the burden of persuasion to establish a prima facie case of retaliation by showing: "(1) participation in a protected activity [and] that the defendant knew of the protected activity; (2) an adverse employment action; and (3) a causal connection between the protected

activity and the adverse employment action." McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802–05 (1973); Hicks v. Baines, 593 F.3d 159, 164 (2d Cir. 2010).

If Plaintiff sustains this initial burden, "a presumption of retaliation arises." Hicks, 593 F.3d at 164. The burden then shifts to the Defendant to produce and "articulate a legitimate, non-retaliatory reason for the adverse employment action." Id. Once Defendant-employer articulates a legitimate non-retaliatory reason for the alleged adverse employment action, the presumption of retaliation dissipates, and the burden shifts back to Plaintiff, via the burden of persuasion, to show that this reason was pretextual. Zann Kwan v. Andalex Group LLC, 737 F.3d 834, 839 (2d Cir. 2013); Hicks, 593 F.3d at 164.

This brief will argue that, first, Plaintiff failed to establish her initial prima facie burden of retaliation. Specifically, she failed to show there was (A) an adverse employment action; and (B) she failed to show a causal connection between the filing of her sexual harassment complaint and the alleged adverse employment action. Second, even if she was to make her initial prima facie burden, Defendants proffered legitimate non-retaliatory reasons for giving her a "marginal" overall MPR grade and for transferring her. Third, Plaintiff cannot prove by the burden of persuasion that the proffered legitimate non-retaliatory reasons were pretextual.

Defendants do not dispute that Plaintiff acted in good faith when she reported an alleged incident of sexual harassment or that the TA did not have knowledge of her reports. Therefore, this brief will not address these elements of the retaliation claim.

I. Diane Leibovitz Failed To Meet Her Initial Prima Facie Burden Of Retaliation.

Plaintiff failed to show that the TA's employment actions had a materially adverse effect on her because the conduct was beneficial to her, normal TA practice and the terms and conditions of her employment remained the same. Plaintiff also failed to establish a causal link between the

sexual harassment report with the TA's alleged adverse conduct because these actions were in motion before her report.

A. Plaintiff failed to establish adverse action because her transfer was beneficial to her, normal TA practice, and the terms and conditions of her employment remained the same.

"[W]hen considering a retaliation claim, Courts look to see whether the employment actions were materially adverse. Burlington Northern and Santa Fe Ry Co. v. White, 548 U.S. 53, 67 (2006). Materially adverse employment actions are those that deter or "dissuade a reasonable worker from seeking or supporting a charge of discrimination." Id. at 57. There is no per se bright-line rule; instead, Courts will look at the particular circumstances of each case to determine the significance of any given act of retaliation in its context. Id. at 67. However, the threshold inquiry in finding adverse employment action is that the action must entail: (1) a change in working conditions that are more disruptive than a mere inconvenience; or (2) an alteration of job responsibilities. Terry v. Ashcroft, 336 F.3d 128, 138 (2d Cir. 2003).

Examples of materially adverse changes include termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguishable title, a material loss of benefits, and significantly diminished material responsibilities. Id. at 138. A negative evaluation is not, by itself, sufficient to constitute a materially adverse employment action. Sanders v. New York City Human Resources Admin., 361 F.3d 749, 756 (2d Cir. 2004). However, negative or critical evaluations can support a case of retaliation when Plaintiff can offer proof that the evaluation affected the terms and conditions of their employment. Id. For a Plaintiff to establish that regular disciplinary actions or corrective actions, either on their own or in conjunction with other acts, were retaliatory, they must present evidence that these actions demonstrated a departure from the

organization's normal practices. Rivera v. Rochester Genesee Regl. Transp. Auth., 743 F.3d 11, 26 (2d Cir. 2014).

Trivial harms, petty slights, or minor annoyances do not amount to adverse employment action. Tepperwien v. Energy Nuclear Operations, Inc., 663 F.3d 556, 571 (2d Cir. 2011). Even if a Plaintiff can demonstrate that the employer engaged in multiple trivial actions, it does not amount to retaliation. Id. at 572. Criticism of an employee is part of training and is necessary for employees to develop and improve; thus, criticism by an employer is not automatically an adverse employment action. Weeks v. New York State (Div. of Parole), 273 F.3d 76, 85 (2d Cir. 2001).

Here, Plaintiff fails to establish a prima facie case of retaliation. First, the MPR grade had no adverse effect on Plaintiff. Her initial grade was "marginal," but it ultimately became "good." During the time between her "marginal" and "good," she had the same salary, received the same benefits, held the same title, and the terms and conditions of her employment all remained the same. Moreover, Mr. Easter followed normal TA practice when he gave her this grade. This grade, alongside its detailed comments, was meant to highlight areas where she needed improvement. This is not an adverse action but merely constructive criticism necessary for Plaintiff's professional development.

Second, Plaintiff's transfer to the 207 shop was also normal TA practice; TA employees are always transferred for training or promotions. Plaintiff herself has been transferred seven times during the past five years. Her transfer to the 207 shop benefited her because she was mentored by Richard Buffington, a TA technician since 1977 with a wealth of operational and technical experience. Under Mr. Buffington, Plaintiff could get the technical training required for someone in her position. See Galabya v. New York City Bd. of Educ., 202 F.3d 636, 641 (2d Cir. 2000) (for a transfer to be considered materially adverse action, a Plaintiff must show that the transfer created

a materially significant disadvantage). This is part of the TA system: ensuring subway riders that their operational employees are adequately equipped with the technical skills to do the job.

Plaintiff may argue that she felt anxious for the four months before receiving an overall "good" on her MPR in December and therefore suffered an adverse action. However, this argument fails because it is normal for the TA to finalize her grades around December. Moreover, during this period, the conditions of her employment remained the same. She might also argue that the transfer to the 207 shop placed her in a non-budget position and thus was adverse. However, this argument also fails because she held the same title and received a pay raise while at the 207 shop. See, e.g., Fairbrother v. Morrison, 412 F.3d 39, 56 (2d Cir. 2005) (if a transfer does not create a significant change in the conditions of employment, and if it only changes some of the plaintiff's job responsibilities, then this transfer cannot be considered materially adverse); Kessler v. Westchester County Dept. of Soc Services., 461 F.3d 199 (2d Cir. 2006) (the Court found no adverse action by the transfer of the plaintiff because it was not less prestigious nor was it less suited to her skills and experience).

Therefore, Plaintiff suffered no materially adverse action to support her retaliation claim.

B. Plaintiff failed to show a causal connection because the Defendant-employer's action began before she reported sexual harassment.

Title VII retaliation claims require proof of but-for causation that the unlawful retaliation would not have occurred in the absence of the employer's alleged wrongful action or actions. University of Texas Southwestern Medical Center v. Nassar, 570 U.S. 338, 360 (2013). But-for causation does not require proof that retaliation be the sole cause of the employer's alleged adverse action. However, Plaintiff must show that the adverse action would not have occurred in the absence of the retaliatory motive. Zann Kwan, 737 F.3d at 846. Plaintiffs often seek to establish causation indirectly through temporal proximity at the prima facie stage by showing that the

alleged adverse employment action followed the protected activity closely in time. Id. at 845. However, employers are not obligated to abandon corrective measures upon learning of a Plaintiff's protected activity. Clark County School Dist. v. Breedan, 532 U.S. 268, 274 (2001) ("[e]mployers need not suspend previously planned transfer upon discovering that a Title VII suit has been filed, and their proceeding along lines previously contemplated, though not yet definitely determined, is no evidence whatever of causality.") (emphasis added).

Here, Plaintiff cannot show that her transfer to the 207 shop and MPR grade would not have occurred if she had not reported the alleged sexual harassment. Plaintiff's well-documented performance problems began before she filed her report, and the Defendants had already begun to take corrective actions. Mr. Easter, in August 2021, reassigned Plaintiff from inspections to car desk because of her lack of operational knowledge. Mr. Easter drafted, signed, and submitted Plaintiff's annual MPR, with a "marginal" grade, on September 17, 2021, and Plaintiff filed the sexual harassment report six days later, on September 23, 2021. Mr. Easter always intended for his evaluation of Plaintiff to be a "marginal" overall rating. Moreover, due to the 240 shop's poor performance and low morale, Mr. Hoffman already intended to "blow" the 240 team up. Thus, these corrective measures by Defendants were already in motion before Plaintiff's report.

Therefore, there is no causal link between her sexual harassment report and her transfer to the 207 shop and MPR grade to support her retaliation claim.

II. The TA Proffered A Legitimate Non-Retaliatory Reason For Transferring the Plaintiff.

If Plaintiff could establish her initial prima facie burden, it then shifts to the employer to articulate some legitimate, non-retaliatory reason for the employment action. Zann Kwan, 737 F.3d at 845. This showing is easily satisfied. See, e.g., Zann Kwan, 737 F.3d at 845 (unsuitability of skills and poor performance satisfies as a legitimate reason for employment action); Jute v.

Hamilton Sunstrand Corp., 420 F.3d 166, 179 (2d Cir. 2005) (company restructuring satisfies as a legitimate reason for employment action); Wang v. State Univ. of New York Health Scis Ctr. At Stony Brook, 470 F.Supp.2d 178, 185 (E.D.N.Y. 2007) (factual discrepancies regarding a plaintiff's professional background and verification of professional credentials satisfies as a legitimate reason for employment action); Giscombe v. N.Y.C. Dep't of Educ., 39 F. Supp. 3d 396, 403 (S.D.N.Y. 2014) (allegations of sexual misconduct requiring disciplinary action satisfies as a legitimate reason for employment action); Quinn v, Green Tree Credit Corp., 159 F.3d at 770-71 (2d Cir. 1998) (employee's history of rudeness towards clients and coworkers satisfies as a legitimate reason for employment action).

Here, the legitimate non-retaliatory reason for transferring Plaintiff was that she lacked the technical knowledge to perform her duties as a Deputy Superintendent. Her shortcomings are well documented: (1) the subway cars' brake shoes incident under her supervision; (2) consistent air conditioning system malfunctions under her watch; (3) her lack of technical skills; and (4) her failure to communicate effectively to subordinates. All these issues were documented. Instead of firing her, the TA invested in her by transferring her to get the proper training and mentorship.

Therefore, Defendants satisfied their burden to proffer a legitimate non-retaliatory reason for their alleged adverse actions.

III. Plaintiff Failed To Show That Defendants' Non-Retaliatory Reasons Were Pretextual.

Once an employer offers a legitimate non-retaliatory reason for the alleged adverse action, the burden shifts back to Plaintiff to show that this reason was pretextual. A Plaintiff may show pretext by demonstrating weaknesses, implausibility, inconsistencies, incoherencies, or contradictions in the employer's proffered reasons that would raise doubt in the fact finder's mind that the employer did not act for those reasons. Zann Kwan, 737 F.3d at 839, 845 (finding the

employer's reasons were pretext because they waivered by giving two extremely different reasons for their action toward the plaintiff).

Mere conclusory allegations cannot dispel Defendants' non-retaliatory legitimate reasons as pre-textual. Wang, 470 F.Supp.2d at 185. While temporal proximity is sufficient to show causation at the initial prima facie level, temporal proximity alone cannot rebut the employer's legitimate non-discriminatory reason as pretextual. El Sayed v, Hilton Hotels Corp., 627 F.3d 931 (2d Cir. 2010). Thus, to show pretext, Plaintiff must combine temporal proximity with other evidence, such as inconsistent employer explanations. Zann Kwan, 737 F.3d at 848.

Here, The TA's reason for Plaintiff's transfer never wavered. She was transferred because she lacked the proper technical skills and training to perform her job safely. Mr. Easter always intended to give Plaintiff a "marginal" grade – hence, he did it before her sexual harassment report. Furthermore, revising the MPRs is a normal TA practice. First, the direct supervisor will grade the employee, and after a few revisions and a few months, the Vice President will sign off on the final grade. Every reason Defendants provided are legitimate and not pretextual because they were either the company's normal practice or the conduct was already in motion and decided before Plaintiff's complaint.

Therefore, Plaintiff cannot establish a retaliation claim because Defendants' legitimate non-retaliatory reasons are not pretextual.

CONCLUSION

Plaintiff failed to establish a prima facie case of retaliation. She failed to prove that her report of sexual harassment was the but-for cause of her MPR grade and her transfer to the 207 shop. On the other hand, Defendants successfully met their burden and offered a legitimate non-retaliatory reason for Plaintiff's transfer and MPR grade. These reasons were also not pretextual

because transferring employees for additional technical training is a normal TA practice, and Mr. Easter's "marginal" grade of Plaintiff's occurred before her report. Therefore, the Court should dismiss this retaliation claim.

Applicant Details

First Name	**Daniel**
Last Name	**Zonas**
Citizenship Status	**U. S. Citizen**
Email Address	**danielzonas@yahoo.com**
Address	**Address** Street **3000 Chautauqua Ave #222** City **Norman** State/Territory **Oklahoma** Zip **73072**
Contact Phone Number	**2392502578**

Applicant Education

BA/BS From	**Florida State University**
Date of BA/BS	**May 2021**
JD/LLB From	**University of Oklahoma College of Law** **http://law.ou.edu**
Date of JD/LLB	**May 15, 2024**
Class Rank	**30%**
Law Review/Journal	**Yes**
Journal(s)	**Oil and Gas, Natural Resources, and Energy Journal**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Nicholson, Daniel
dnicholson@ou.edu
Jon, Lee
jon.lee@ou.edu
Gensler, Steven
sgensler@ou.edu

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Daniel Zonas

(239) 250-2578 - danielzonas@yahoo.com

6/23/2023

Judge Walker:

I am writing to apply for a 2024-2025 clerkship with your chambers. I moved from Naples, Florida to Norman, Oklahoma to start my legal career in 2021, and I am now a 3L at the University of Oklahoma College of Law.

I like researching and writing about novel legal issues. As far as I can tell, clerking for you would be the best opportunity in the world because a federal docket contains almost every type of case there is.

I would do great work as a federal clerk. I am an Articles Editor for the Oklahoma Oil and Gas, Natural Resources, and Energy Journal, so I will be editing and proofreading my peers' work during the 2023–2024 schoolyear. During my internships, I have drafted countless pleadings and other papers, including a brief that was argued at the Oklahoma Supreme Court. I've researched and written memoranda on all sorts of topics, everything from defenses for criminal charges to the viability of a nuisance claim arising from dog barking. My supervising attorneys rely on my work because I make sure it's correct and clearly written. Nevertheless, when I write, I like to focus not just on accuracy and clarity, but also conciseness. Every sentence is more words that the reader needs to slog through, so I keep wordiness to a minimum.

I am confident that my educational and professional experience will make me an asset. Please let me know if we can schedule an interview. I want this clerkship, and I will work hard for you if I get it.

Respectfully,
Daniel Zonas

Daniel Zonas

(239) 250-2578 - danielzonas@yahoo.com

Education

University of Oklahoma College of Law 2021–2024

- GPA: 9.339/12.0 (equivalent to 3.4/4.0)
- Rank: 59 of 201
- Articles Editor for the Oil and Gas, Natural Resources, and Energy Journal
- Dean's Honor Roll Fall 2021 and Spring 2023
- Amicus Society Public Interest Fellow, over 250 pro-bono hours

Florida State University 2017–2021

- B.A. in Philosophy

Professional Experience

Jason Waddell, PLLC Summer 2023
Law Clerk *Oklahoma*

- Drafted a Brief in Support of Application for Writs of Prohibition & Mandamus regarding an Order enforcing overbroad subpoenas duces tecum.
- Drafted countless pleadings, including a Motion for Summary Judgment for a breach of contract claim, a Motion to Strike regarding improper affidavits, and a response to a Motion to Dismiss for a dog bite case.
- Attended many depositions and hearings.

Mazaheri Law Firm Spring 2023, Summer 2023
Law Clerk *Oklahoma*

- Drafted a Response to a Position Statement for a Title VII retaliation claim.
- Drafted many research memoranda, including the legality of a tipping policy, defenses for a reckless conduct charge, and venue for a property dispute.
- Drafted several divorce decrees and an antenuptial agreement.
- Drafted many demand letters, EEOC charges, and discovery requests.

Oklahoma County District Attorney's Office Summer 2022
Law Clerk *Oklahoma*

- Assisted ADAs in the Oklahoma County Diversions program.
- Managed restitution for Diversion Court participants.
- Attended many trials, hearings, and arraignments.
- Drafted a Motion to Dismiss for the Felonies Team.

Schwartz & Zonas Summer 2018, Summer 2019
Receptionist *Florida*

- Handled client intake for personal injury and criminal defense attorneys.

The University of Oklahoma College of Law

300 West Timberdell Road
Norman, OK 73019
(405) 325 - 4699
http://www.law.ou.edu

Grade Points

A+	12
A	11
A-	10
B+	9
B	8
B-	7
C+	6
C	5
C-	4
D+	3
D	2
D-	1
F	0

THE UNIVERSITY OF OKLAHOMA COLLEGE OF LAW UNOFFICIAL TRANSCRIPT

Zonas, Daniel Patrick
716 W Saint Augustine St
Tallahassee, FL 32304-4330

Course	Dept	No.	Hours	Grade
Fall 2021				
Legal Foundations	LAW	6100	1	S
Property	LAW	5234	4	B+
Torts	LAW	5144	4	A-
Research/Writing & Analysis I	LAW	5123	3	B+
Civil Procedure I	LAW	5103	3	B+
GPH: 14	GPS: 130	HA: 15	HE: 15	GPA: 9.286
Spring 2022				
Criminal Law	LAW	5223	3	B+
Civil Procedure II	LAW	5203	3	A-
Intro to Brief Writing	LAW	5201	1	B+
Constitutional Law	LAW	5134	4	B
Oral Advocacy	LAW	5301	1	B
Contracts	LAW	5114	4	B
GPH: 16	GPS: 138	HA: 16	HE: 16	GPA: 8.625
Summer 2022				
Extern Placement	LAW	6400	3	S
Issues in Professionalism	LAW	6400	2	S
GPH: 0	GPS: 0	HA: 5	HE: 5	GPA: 0.000
Fall 2022				
Evidence	LAW	5314	4	A
Trademarks	LAW	6223	3	A-
Oil and Gas	LAW	6540	3	B
Professional Responsibility	LAW	5323	3	B+
ONE J	LAW	6331	1	S
GPH: 13	GPS: 125	HA: 14	HE: 14	GPA: 9.615
Spring 2023				
Family Law	LAW	5443	3	B+
Secured Transactions	LAW	5750	3	A-
Torts II	LAW	6100	2	B+
Oil and Gas Contracts and Tax	LAW	6550	3	A
Tort Law/Communications Media	LAW	6700	2	A
GPH: 13	GPS: 130	HA: 13	HE: 13	GPA: 10.000
Fall 2023				
Crim Pro: Investigation	LAW	5303	3	

Income Taxation of Individuals	LAW	5463	3	
Civil Pretrial Litigation	LAW	5530	3	
Unincorporated Entitities	LAW	5733	3	
Workers' Compensation	LAW	6100	2	
Trial Techniques	LAW	6410	3	
GPH:	GPS:	HA:	HE:	GPA:

	GPH	**GPS**	**HA**	**HE**	**GPA**
OU CUM:	56	523	63	63	9.339

UNOFFICIAL END OF RECORD ***UNOFFICIAL***

The University of Oklahoma

COLLEGE OF LAW

DANIEL NICHOLSON
ASSOCIATE PROFESSOR OF LEGAL PRACTICE
UNIVERSITY OF OKLAHOMA LAW CENTER
300 WEST TIMBERDELL ROAD
NORMAN, OKLAHOMA 73019
Phone:(405) 405-325-5634
E-mail: dnicholson@ou.edu

June 11, 2023

Dear Judge:

I am writing this letter on behalf of Daniel Zonas a law student who has applied for a federal clerkship. I had the pleasure of having Daniel as a 1L in Research/Writing & Analysis I, Intro to Brief Writing, and Oral Advocacy classes. Daniel is a diligent and capable student who has consistently shown strong skills in legal research, writing, and analysis. He has a solid understanding of complex legal concepts and has the ability to articulate them effectively in writing. In my legal writing class, Daniel produced well-reasoned legal documents, displaying his knowledge of the law and its practical application.

Apart from his academic achievements, Daniel is motivated to keep learning about the practice of law outside of classes. His resume notes that he has drafted many court documents for practicing attorneys since his 1L year. While I haven't had an opportunity to interact with Daniel since having him in class, I'm happy to see he has continued honing his legal writing and critical thinking skills.

Based on Daniel's academic performance, writing ability, and work ethic, I believe he would be a suitable candidate for a federal clerkship. I have confidence that he possesses the necessary qualities and abilities to fulfill the responsibilities of this role. He will make valuable contributions to any court he has the opportunity to join.

If I may be of further assistance, please do not hesitate to telephone or write me.

Sincerely,

Daniel Nicholson
Associate Professor of Legal Practice
OU College of Law

The UNIVERSITY of OKLAHOMA
College of Law

June 26th, 2023

The Honorable Jamar Walker
United States District Court for the Eastern District of Virginia
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Re: Recommendation for Daniel Zonas

Dear Judge Walker,

I have been asked to write a letter in support of Daniel Zonas' application for a clerkship in your chambers. Last fall, I had the pleasure of working closely with Daniel in my Evidence and Trademark Law courses. Based on my interactions with him and his performance in my courses, I am confident that Daniel would be an asset to your chambers.

Without question, Daniel was a standout student in both my Evidence and Trademark Law courses. Ordinarily I would not recommend that students take both courses at the same time; Evidence is incredibly dense, and Trademark Law is exceedingly nuanced. But Daniel seemed to easily handle the workload in both courses. When he was on call (which is frequent in my classes), he was extremely engaged and thoughtful in his responses. Daniel's voice is not the loudest in the room, but when he speaks other students listen. He emerged as one of the "quiet" leaders in the classroom, and other students looked to him for guidance.

Daniel also made it a point to come to see me during my office hours. He has a group of "study buddies" that work together on the problems, and I can tell that they get along quite well together. That type of collegiality will serve him well as he transitions to the next phase of his career. But once again, Daniel was the natural leader in that group. He came to office hours prepared with a list of questions and tentative answers, making our time together more productive. He did not always have the correct answers, but he had clearly made the effort to think critically about them before speaking with me.

Daniel's exam performance was among the strongest in both classes. To be honest, I am a difficult grader and have high expectations. So, for him to get A-range grades in both classes is impressive. The Trademark Law class in particular was a very talented group of students, and it had a significant percentage of third-year students. Yet Daniel performed quite well in that class and had one of the highest exam scores. My sense is that perhaps Daniel did not perform as well in his first year of law school, but clearly by the time he enrolled in my classes he completely understood what he needed to do to excel.

Andrew M. Coats Hall, 300 Timberdell Road, Norman, Oklahoma 73019-5081, PHONE: (405) 325-4699
WEBSITE: LAW.OU.EDU

In terms of Daniel's work style and interpersonal skills, I found him to be an extremely diligent worker and very receptive to suggestions and constructive criticism. If I were to classify Daniel, it would be as a "doer"—he gets things done without question. That said, he brings ideas to the table as well. As a former federal appellate clerk myself, I like to think that I know what types of law students would make excellent clerks. Daniel seems to fit that mold well.

There is no doubt that Daniel Zonas has the requisite intellect and training to make an excellent judicial clerk. However, I strongly believe that his strong work ethic, collegial personality, and his adaptability will truly make him an excellent addition to your chambers.

Please let me know if you have any questions or would like additional information.

Regards,

Jon J. Lee

Professor Nicholson | Word Count: 4993 | Daniel Zonas § 3B
Mar. 14, 2022
Appellate Brief

NO. 22-050

IN THE
SUPREME COURT OF THE UNITED STATES
SPRING TERM, 2022

JAMIE WHITTEN,

Petitioner,

v.

STATE OF GARNER,

Respondent.

On Writ of Certiorari to the
Garner Supreme Court

BRIEF FOR PETITIONER

Daniel Zonas
Attorney for Petitioner

Professor Nicholson Word Count: 4993 Daniel Zonas § 3B
Mar. 14, 2022
Appellate Brief

QUESTION PRESENTED

The First Amendment provides "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." However, some states have passed legislation prohibiting video recording of police officers without all-party consent.

The state of Garner passed an anti-surreptitious recording law prohibiting the creation of any sort of recording containing any conversation without all-party consent or prior warning. After recording her own arrest during a rowdy protest and subsequent interactions with her arresting officers, Whitten was charged with violating the statute.

Did this application of the Garner statute violate Whitten's First Amendment rights?

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OPINIONS BELOW

The opinion of the District Court is unavailable. The opinion of the Supreme Court of Garner is available in the Record. (R. at 2–8.)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the application of the First Amendment of the United States Constitution, which provides: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." U.S. Const. amend. I. This case also involves the interpretation and application of Garner Statute title 75, § 52, which prohibits recording any conversation "without the consent of all parties" or otherwise without warning. (R. at 8–9.)

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STATEMENT OF THE CASE

Jamie Whitten attended an animal rights protest at Wild Animal Safari, where there was a large crowd being subdued by law enforcement. (R. at 3–4.) The protest was an open demonstration that took place on private property open to the public. (R. at 6.) While police officers attempted to control the protestors, Whitten began recording the protest on her iPhone. (R. at 4.) She then placed her phone in her pocket while it continued to record. (R. at 4.)

Subsequently, Whitten was arrested on unrelated charges. (R. at 4.) She continued to record as she was being arrested. (R. at 4.) Whitten recorded her conversation with the police officers while in the patrol car. (R. at 4.) Her iPhone continued to record until just before she was placed in her holding cell, where it was confiscated and the recording was terminated by the police. (R. at 4.)

Whitten was charged with violation of Garner's Anti-Surreptitious Recording Privacy Law for filming her arrest and later conversation with the police in the patrol car. (R. at 5.)

SUMMARY OF THE ARGUMENT

This Court should reverse the decision of the Supreme Court of Garner and remand this case for further proceedings. The Fourteenth Circuit is made an outlier among precedent from other circuits from this decision, and the Supreme Court of Garner caused an artificial circuit split to turn into a real circuit split. Other circuits have held that one has a First Amendment right to record police officers

performing their duties in public spaces, and Whitten's case falls within these boundaries.

The Garner statute limits recording rights, which infringes upon First Amendment rights. The statute prohibits the recording of conversations without consent. The recordings created through this activity are categorically different from any other sort of recordings. Since the statute's goal of privacy cannot be justified without reference to this type of content, the Garner statute is content-based and should be analyzed under strict scrutiny.

Even if this Court must apply intermediate scrutiny, the Garner statute is still unconstitutional as applied to Whitten. Under intermediate scrutiny, protecting police privacy as individuals undermines the right of the public to receive information about government activity. As such, the government interest in the Garner statute is not substantial and cannot be justified under intermediate scrutiny.

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ARGUMENT AND AUTHORITIES

THE GARNER ANTI-SURREPTITIOUS RECORDING STATUTE IS UNCONSTITUTIONAL AS APPLIED TO JAMIE WHITTEN.

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." U.S. Const. amend. I. The right to freedom of speech listed in the First Amendment to the U.S. Constitution is applicable to the states through the Due Process Clause of the Fourteenth Amendment. *Gitlow v. New York*, 268 U.S. 652 (1925). The state of Garner's Anti-Surreptitious Recording Privacy Law is competing with the right to free speech in this case. (R. at 8.) The state of Garner passed this statute under its authority to protect a person's general right to privacy, a privilege granted to the states. *Katz v. United States*, 389 U.S. 347, 350–51 (1967). This regulation prohibits recording a conversation surreptitiously or otherwise without consent or prior warning. (R. at 8–9.) The regulation leaves an exception for verified journalists, who are granted authority to film interactions between police officers and citizens by being immune to the Garner statute. (R. at 9.)

The Garner statute burdens First Amendment rights, as the right to free speech encapsulates free sharing of information, which entails the right to create such information. *Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184, 1203 (9th Cir. 2018). Furthermore, the state of Garner's purpose in enacting this legislation is to regulate specific content, conduct that warrants analysis under strict constitutional scrutiny. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

Professor Nicholson Word Count: 4993 Daniel Zonas § 3B
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This Court should reverse the Garner Supreme Court's ruling and find the Garner statute unconstitutional as applied to Whitten. Applying the Garner statute to individuals recording police officers performing their duties on public property and private property open to the public violates fundamental rights of individuals granted under the First Amendment. These rights are substantial enough to render the Garner statute unjustifiable.

This case involves a constitutional inquiry and is therefore reviewed de novo. U.S. Const. art. III, § 3; *see also Marbury v. Madison*, 5 U.S. 137 (1803).

A. The Garner statute should be analyzed under strict scrutiny.

1. The Garner statute restricts First Amendment rights.

The First Amendment of the Constitution of the United States holds, "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." U.S. Const. amend. I. This extends beyond the right to share information and includes the right to create such information, like an audiovisual recording. *Am. C.L. Union of Illinois v. Alvarez*, 679 F.3d 583, 595–96 (7th Cir. 2012). The right to free speech "would be insecure, or largely ineffective, if the antecedent act of *making* [a] recording is wholly unprotected . . . ." *Id*. Agreement is "practically universal" that a primary purpose of the First Amendment is to protect "free discussion of government affairs." *Id*. at 597. The government may not overstep the First Amendment protection of the free sharing of information by simply regulating the means by which such information is gathered. *Id*. Protecting a video under the

First Amendment but not the creation of that video "defies common sense." *Wadsen*, 878 F.3d at 1203.

The Garner statute prohibits audio and/or video recordings of conversations without all-party consent. Whitten was charged with violating this statute in relation to the recording she produced in the police car. Plainly, this statute prohibits the creation of certain audiovisual recordings, behavior that is protected by the First Amendment. So, the Garner statute restricted Whitten's First Amendment rights.

2. The Garner statute is a content-based restriction, and should be subject to strict scrutiny.

Statutes that burden constitutional rights are unconstitutional unless they are able to survive an applicable level of scrutiny. *Alvarez*, 679 F.3d at 601–02. Freedom of expression is "subject to reasonable time, place, or manner restrictions." *Clark v. Cmty. For Creative Non-Violence*, 468 U.S. 288, 293 (1984). These restrictions are valid if they are content-neutral and meet an intermediate scrutiny standard. *Id*. Contrarily, content-based restrictions must meet the standard of strict scrutiny. *Alvarez*, 679 F.3d at 603. Content-neutrality depends on the purpose of the regulation in question. *Id*. "Regulations that are unrelated to the content of speech are subject to an intermediate level of scrutiny . . . because in most cases they pose a less substantial risk of excising certain ideas or viewpoints from the public dialogue." *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 642 (1994). If a regulation's purpose is unrelated to the content of expression, it's content-neutral. *Ward*, 491 U.S. at 791. This holds true even if "it has an incidental effect on some

speakers or messages but not others." *Id*. Thus, "[t]he government's purpose is the controlling consideration." *Id*. A law is content-based if it was enacted "because of disagreement with the message [speech] conveys." *Id*. Importantly, a "facially content-neutral" law can be content-based if it "cannot be "'justified without reference to the content of the regulated speech . . . .'"" *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 164 (2015) (quoting *Ward*, 491 U.S. at 791).

The Garner statute distinguishes and prohibits some types of content. It disallows recordings made secretly, and allows recordings made with consent or a warning. Secret recordings are different in content from recordings made with consent. Individuals who know they are being recorded act differently than if they are being recorded secretly, entailing different recordings being made. Crucially, if both secret and permissive recordings were to share the same content, there would be no purpose served in banning one of them but not the other. So, the Garner statute necessarily categorically bans some types of content.

The fact that the Garner statute bans some types of content and not others does not entail that it's content-based. Instead, one must look to the government's purpose to determine whether the statute is content-based. The government's purpose in the Garner statute can be found in its name, "Anti-Surreptitious Recording Privacy Law." (R. at 8.) Clearly, the regulation was put in place for the sake of individual privacy. However, what is also present in the statute title is the means by which the state attempts to achieve this end, "Anti-Surreptitious

Recording." So, the goal of the statute is individual privacy, and the means is the prohibition of secret recordings.

A surreptitiously recorded video may have no definitive signs that it was recorded without consent. However, it remains unique content enabled by one's ability to record without consent. Such a recording would not exist without an ability to create it. Furthermore, once it does exist, the government cannot distinguish content that was secretly recorded from content that was recorded with consent even though they are separate types of content, one of which the government has an interest in prohibiting.

It's important to understand that the means are intimately tied to the ends of the Garner statute. The statute cannot be construed without regulating specific content. In fact, the only reason the statute is effective is because it regulates expression based on the substance of that expression's content. According to *Turner*, the purpose of intermediate scrutiny being applied to content-neutral regulations is because they don't pose as much risk in eliminating certain viewpoints. However, the Garner statute is wholly founded on which content the government deems appropriate.

Content that is obtained surreptitiously is not regulated because of the means through which it was obtained. Instead, it's regulated because of government disapproval of the content itself. The regulation of surreptitiously gathered content is not incidental, but the integral and primary goal of the statute. The goal of privacy in this statute's context cannot be justified without reference to its means,

which consists of content discrimination and regulation. As such, in congruence with the standard in *Reed*, the Garner statute is content-based and should be subject to strict scrutiny.

B. The Garner statute survives neither intermediate nor strict scrutiny as applied to Jamie Whitten and is therefore unconstitutional.

In order to survive strict scrutiny, a law must be "necessary to serve a compelling state interest" and "narrowly drawn to achieve that end." *Wadsen*, 878 F.3d at 1204. In order to survive intermediate scrutiny, a law must be "narrowly tailored to serve a substantial government interest." *Ward*, 491 U.S. at 789. If a law fails an intermediate scrutiny test, it will also fail a strict scrutiny test. *Alvarez*, 679 F.3d at 604. However, if a law does not fail an intermediate scrutiny test, it may still fail a strict scrutiny test. *Id.*

Although strict scrutiny should apply to this case, the Petitioner recognizes the possibility that this Court may not accept its argument for strict scrutiny. Even if intermediate scrutiny should apply, however, the Garner statute does not survive and is unconstitutional as applied to Whitten. Strict scrutiny is a heightened form of intermediate scrutiny, maintaining the same elements and relationship between them. Therefore, the following argument will be tailored to the less constitutionally demanding standard of intermediate scrutiny, but remains unchanged in substance if strict scrutiny is determined to be the applicable standard.

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1. Individuals have a right to record police officers performing their duties in public spaces.

The driving force behind the right to record police officers performing their duties is the interest the public has in the "free discussion of government affairs." Gregory T. Frohman, Comment, *What Is and What Should Never Be: Examining the Artificial Circuit "Split" on Citizens Recording Official Police Action*, 64 Case W. Res. L. Rev. 1897, 1908 (2014). There is a significant "role of police recordings in exposing police conduct to the public." *Id.* at 1903. This interest is substantial, and a muscle that is used to "distinguish a free nation from a police state." *Glik v. Cunniffe*, 655 F.3d 78, 84 (1st Cir. 2011). Distinctly, "a person's general right to privacy" is "left largely to the law of the individual states." *Katz*, 389 U.S. at 350–51.

Numerous circuits have recognized a right to record police officers performing their duties in public spaces. Gregory T. Frohman, *What Is and What Should Never Be: Examining the Artificial Circuit "Split" on Citizens Recording Official Police Action* 1897, 1940 (2014). In fact, on this question, there only exists an "artificial circuit split," where some courts affirm the right exists and others dodge the question by instead dealing with qualified immunity and whether the right is "clearly established." *Id.* This strategy stems from the decision in *Pearson v. Callahan*, where the Supreme Court vested discretion in district and circuit court judges to decide which prong of qualified immunity should be addressed first. *Pearson v. Callahan*, 555 U.S. 223, 236 (2009). These prongs are, (1) whether there is a violation of a constitutional right, and (2) whether that right was clearly

established at the time. *Id*. If a court chooses to tackle prong (2) and finds that a constitutional right is not clearly established, its analysis could end there. *Id*. In fact, because of this allowance, no courts have specifically denied the existence of the right to surreptitiously record police officers performing their duties. Frohman, *supra* at 1940.

In *Shevin v. Sunbeam Television Corp.*, a Florida wiretapping statue's constitutionality was challenged. *Shevin v. Sunbeam Television Corp*., 351 So. 2d 723, 725 (Fla. 1977). Sunbeam Television Corp., a news company, claimed that "secret recordings" prohibited by the statute had value to the public in that they assured accuracy of recordings made. *Id*. However, the court found the statute to be constitutional, holding that "hidden mechanical contrivances are not indispensable tools of news gathering." *Id*. at 727. Some cases have established an affirmative right to secretly record police officers performing their duties. *Fields v. City of Philadelphia*, 862 F.3d 353, 355 (3d Cir. 2017). In *Fields v. City of Philadelphia*, two individuals, one of which was arrested, brought suit against the city for retaliation against their recording of police officers performing duties on a public sidewalk and at a convention center, respectively. *Id*. at 356. *Fields* affirmed the individuals had a First Amendment right to carry this out, citing the importance of accessing "information regarding public police activity." *Id*. at 359. Furthermore, in *Glik*, an individual was arrested after videotaping police officers carrying out another individual's arrest in a park. *Glik*, 655 F.3d at 79. The court found through an unabridged qualified immunity analysis that this person had a First Amendment

right to film the arrest because it was a "matter of public interest" and was carried out in a public space. *Id.* at 84.

In addition to citing a "right to record matters of public interest," the court noted that "news-gathering protections of the First Amendment cannot turn on professional credentials or status." *Id.* at 83–84. The latter point was supported by the idea that one's right to access information is "coextensive" with that of the press, and a contemporary news story is "just as likely" to be produced by an individual as an actual reporter. *Id.* Additionally, in *Smith v. City of Cumming*, an individual was prevented from taking a video of police actions in violation of his First Amendment rights. *Smith v. City of Cumming*, 212 F.3d 1332, 1332 (11th Cir. 2000). The court determined that the individual did in fact have this right to film, and nothing that the "press generally has no right to information superior to that of the general public." *Id.* at 1333.

The court in *Shevin* did not err in its ruling, and presents no impediment to Whitten's case. *Shevin* is similar to the instant case in that it involves a wiretapping statute prohibiting a type of recording that is valuable to the public. However, the major difference is that the challenge to the Florida wiretapping statute makes no reference to recording police officers. This fact is what sets *Shevin* apart from Whitten's case and prevents it from contributing to the circuit split on this issue.

The case at hand is much more similar in nature to *Fields* and *Glik*, which involve the videotaping of police officers. A rationale frequently cited in these types

of cases includes informing the public of police activity and newsgathering for dissemination of government affairs. This rationale is not mentioned in *Shevin*. The available cases addressing whether one has a First Amendment right to record police officers while performing their public duties show a clear trend in the affirmative. The public has an undeniable right to monitor the proper fulfillment of police duties, which should be subject to only reasonable restrictions. This is the integral component of Whitten's case that sets her aside from other newsgatherers such as the one in *Shevin*.

One might argue that the Garner statute overcomes the need to afford the public this right to record by granting special privileges to "verified journalists." (R. at 9.) However, this does not stop the statute from violating essential public First Amendment rights. This Court should follow precedent from *Glik* and *Smith* on this issue. While such an exception allows a pathway for exposure of police conduct, *Glik* makes a relevant note that this right is shared by all of the public, and cannot be limited to just reporters. Contemporary technology standards don't make reporters obsolete, but they do influence the scope of people able to gather information. When that information is of particular First-Amendment-protected public interest, government limitation is unconstitutional. In a society with protected free speech, it is important to ensure every person has a right to access information, without qualifications and restrictions.

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The government's interest in individual privacy is not compelling enough to overcome the individual First Amendment right to record police officers performing their duties in public.

2. The right to record police officers performing their duties includes private property that acts as a public space in addition to public property.

The reasoning in *Glik* is limited to "public" spaces. *Glik*, 655 F.3d at 84. The recording in *Glik* took place in a public park. *Id.* at 79. However, in *Gericke v. Begin*, an individual was arrested for filming another individual's traffic stop. *Gericke v. Begin*, 753 F.3d 1, 3 (1st Cir. 2014). The court cited *Glik* in affirming the individual's right to film, saying that the activity was "carried out in public." *Id.* at 7. *Project Veritas Action Fund v. Rollins*, another First Circuit case, acknowledged a lack of clarity in this standard. *Project Veritas Action Fund v. Rollins*, 982 F.3d 813, 827 (1st Cir. 2020), *cert. denied*, 142 S. Ct. 560, 211 (2021). This court consolidated *Glik* and *Gericke*, saying their settings encompass "inescapably public spaces" like "traffic stops" and "public parks," but neither case confirmed nor denied the capacity of a "publicly accessible private property" to count as a "public space." *Id.* In *Fordyce v. City of Seattle*, an individual was arrested after filming police officers and their interactions with a crowd at a protest. *Fordyce v. City of Seattle*, 55 F.3d 436, 438 (9th Cir. 1995). After his charges were dismissed, he brought an action against the city for violation of his first amendment rights. *Id.* The court in this case ruled the plaintiff had a "First Amendment right to film matters of public interest." *Id.* at 439.

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Glik and *Gericke* have both affirmed a right to record in "public." This is useful because it effectively includes public property, which was the setting for both cases. Part of Whitten's charges include her recordings made on public property, in the back of a police car. This setting qualifies as a public space that is "inescapably" public, as it matches up to the *Rollins* standard closely. The interior of a moving police car is hardly different from the traffic stop in *Gericke*. Both take place on public property, and can be viewed by anyone on the street. Thanks to elaboration on the public area constraint from *Gericke*, Whitten's recording inside a publicly-owned police car is very closely analogous to the car in *Gericke* and requires almost no speculation as to whether this location is included in *Glik*. Therefore, Whitten's filming inside a publicly-owned police car is included in the rights affirmed in *Glik*.

However, these cases have not elaborated on whether this includes privately-owned property that acts as a public forum, like the site of Whitten's protest. Whitten's public protest took place at Wild Animal Safari, and included over twenty individuals. (R. at 3–4.)

The analysis in determining whether police should be free from recordings on private property is a determination of what, if anything, has changed in the transfer of setting from public to private property. In other words, the question is whether police officers should have more of a right to privacy, and whether the public has any less of an interest in observing their behavior.

Individuals are only afforded the right to record police officers while they are performing their duties. Just as this public interest no longer exists while their

duties are not being performed, it exists perpetually as long as police duties are being performed. The public has no less interest in sharing and discussing government action on private property than on public property.

The protest at Wild Animal Safari utilized private land as a public forum, and was meant to be seen and heard. The setting of *Fordyce* was a protest that took place on public property. Whitten filmed police interactions like the plaintiff in *Fordyce*. There is no practical reason to separate these two cases besides the simple labels of "public" and "private" property. Functionally, Wild Animal Safari's private property acted in the same way as the public property in *Fordyce*. Just as a police officer would not expect his actions to be private in the protest in *Fordyce*, he could not reasonably expect his actions to be private at the Wild Animal Safari protest. Therefore, police expectation of privacy remains unchanged.

One's right to record police performing their duties in public areas is not contingent on whether a location is public or private, but the function of this location. Police officers performing their duties still have trust placed in them, no matter what sort of property they are on. Therefore, the individual right to record police officers performing their duties should extend to private property that acts as a public space.

3. The right to record should not be limited to third-parties.

In *Glik*, in addition to affirming a general right to record police officers performing their duties in public spaces, the court mentioned that this right is subject to "reasonable time, place, and manner restrictions." *Glik*, 655 F.3d at 84.

The *Glik* court stated that the individual recorded police officers "from a comfortable remove" and didn't "molest them in any way," so his actions satisfied this requirement. *Id*. This standard is shared by *Smith*. *Smith*, 212 F.3d at 1333.

These cases raise potential questions regarding who might be able to record police interactions because they involve third parties filming an arrest, not the actual person being arrested.

The reasonable time, place, and manner restrictions mentioned in *Glik and Smith* indicate that the right to record is also limited in scope to non-intrusive recordings. This is the source of the line "from a comfortable remove" in *Glik*. The purpose of this was not to say police interactions can only be filmed from a "comfortable remove," but that the individual in *Glik* could not have overstepped his constitutional right to record. The ways a person can interfere with an arrest are tremendously limited when that person films from a distance. Filming up-close as a third party presents at least a physical obstacle for police duties. However, this is irrelevant in Whitten's case. Whitten is filming as she is getting arrested. Because the officers did not realize she was recording until she was being searched, Whitten's recording clearly did not interfere with the arrest in any significant way.

The First Amendment right made out in *Glik* and *Smith* was never meant to be exclusively enjoyed by a third-party. Non-intrusiveness, not distance, is the qualifier in these cases, and Whitten falls into this category. A person being arrested has just as much of a right to film police officers performing their duties in

public spaces as anyone else, contingent only upon the time, place, and manner in which the filming is conducted.

CONCLUSION

This Court should reverse the Garner Supreme Court's decision and remand the case for further proceedings. The Garner statute's goal of individual privacy cannot be justified without reference to the category of content it bans. Therefore, it must survive strict scrutiny.

Even if this argument is not accepted, the Garner statute violates Whitten's First Amendment rights and survives neither strict nor intermediate scrutiny. There is a clear pattern in numerous circuits that shows a constitutional right to record police officers performing their duties in public places. Whitten recorded police officers in a reasonable manner, place, and time. This Court should affirm the right established in the First Circuit to preserve free discussion of government affairs.

Respectfully submitted,

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CERTIFICATIONS

CERTIFICATE OF SERVICE

I certify that a true and correct copy of this brief for Petitioner was served on all parties on March 14, 2022, by depositing the briefs in the U.S. Mail, postage prepaid or by personal delivery.

CERTIFICATE OF COMPLIANCE

I certify that this brief contains 4993 words, including every page except appendices.

Respectfully submitted,

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